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OFFICE OF THE  
PRESIDING DISCIPLINARY JUDGE  
SUPREME COURT OF ARIZONA

SEP 06 2011

FILED

BY

**BEFORE THE PRESIDING DISCIPLINARY JUDGE  
OF THE STATE BAR OF ARIZONA**

**In the Matter of Members of the  
State Bar of Arizona,**

**JOINT PREHEARING STATEMENT**

**ANDREW P. THOMAS, Bar No. 014069,  
LISA M. AUBUCHON, Bar No. 013141, and  
RACHEL R. ALEXANDER, Bar No. 020092**

**Case No. PDJ 2011-9002**

The parties hereby submit their Joint Prehearing Statement in the above-referenced case.

**I. STIPULATIONS OF MATERIAL FACT AND LAW**

1. Andrew P. Thomas ("Thomas") was admitted to the Bar of the State of Arizona on October 26, 1991. His Bar Number is 014069.

2. Lisa M. Aubuchon ("Aubuchon") was admitted to the Bar of the State of Arizona on October 27, 1990. Her Bar Number is 13141.

3. Rachel R. Alexander ("Alexander") was admitted to the Bar of the State of Arizona on May 19, 2000. Her Bar Number is 20092.

4. Thomas was elected Maricopa County Attorney in 2004. He was reelected in 2008. He resigned from that office effective April 6, 2010.

5. Aubuchon worked at the Maricopa County Attorney's Office ("MCAO") from 1996 through 2010.

6. Alexander worked at MCAO from 2005 through 2010.

1           7.     In or about March 2006, disagreements arose between Thomas and the Board  
2 concerning the appointment of lawyers from outside MCAO to represent the county. Occasionally,  
3 the county must be represented by an attorney other than the elected county attorney.

4           8.     Thomas wrote a series of letters to Stapley dated March 2, 2006, March 13, 2006,  
5 March 20, 2006 and April 17, 2006 to Stapley about the issue.

6           9.     On May 18, 2006, the Board amended the Revised Restated Declaration of Trust for  
7 Maricopa County.

8           10.    Thomas sent a letter to Stapley dated May 23, 2006.

9           11.    On June 14, 2006, Thomas filed a civil action against the Board seeking a declaratory  
10 judgment concerning the relative rights and obligations of the County Attorney and the Board about  
11 selection and appointment of outside private counsel. *Thomas v. MCBOS*, Maricopa County  
12 Superior Court, CV 2006-008971. MCBOS was represented in this lawsuit by Tim Casey. Thomas  
13 was represented by attorney William "Greg" Fairbourn.

14           12.    On June 14, 2006, the same day that he filed the action against the Board, Thomas  
15 released a public statement that he was suing MCBOS.

16           13.    The Board did not file an answer. The matter was resolved in August 2006 by a  
17 Memorandum of Understanding (MOU) between the parties.

18           14.    In the MOU Thomas agreed that he would dismiss the action and that he and MCBOS  
19 would follow a system with regard to appointment of outside counsel. The MOU expired by its  
20 terms on December 1, 2008.

21           15.    A Maricopa County grand jury indicted Stapley on multiple counts in November  
22 2008 ("*Stapley P*"). In December 2008, a summons was served on Stapley.

1           16.     The 118 count indictment charged Stapley with felonies and misdemeanors regarding  
2 his yearly financial disclosures as a county supervisor and his periodic candidate disclosures dating  
3 back to 1994.

4           17.     Stapley's attorney filed a motion seeking to have the Maricopa County Attorney  
5 disqualified from *Stapley I*.  
6

7           18.     Aubuchon filed a response to the motion.

8           19.     After *Stapley I* was filed, the Presiding Judge of Maricopa County assigned it to  
9 retired Judge Kenneth Fields.

10          20.     On December 10, 2008, the State filed a Motion for Voluntary Recusal Or If Denied  
11 Motion for Change of Judge For Cause.  
12

13          21.     In March or early April 2009, Thomas asked the Yavapai County Attorney, Sheila  
14 Polk, to take over the prosecution of *Stapley I*.

15          22.     On April 2, 2009, the Yavapai County Attorney, Sheila Polk, agreed with Thomas to  
16 take over the prosecution of *Stapley I*.

17          23.     Ms. Polk also agreed that she would handle pending investigations regarding  
18 members of the board of supervisors including allegations against Supervisor Wilcox and an  
19 investigation of the "court tower project."  
20

21          24.     Attorneys for Mr. Stapley filed motions to dismiss the criminal charges against him.

22          25.     On August 24, 2009, Judge Fields granted the motion in part and dismissed many  
23 counts.

24          26.     Thomas issued a public statement on the same day as Judge Fields' ruling.

25          27.     On about December 5, 2008, four county supervisors (Stapley recused himself) met  
26 and decided to hire attorney Tom Irvine to review Thomas' conflicts in representing the Board.

1           28.     On about December 23, 2008, the Board voted to manage all of the civil legal actions  
2 in which the County was a party.

3           29.     MCBOS delegated to County Manager David Smith the implementation of that  
4 action. Eventually a civil litigation department separate from the county attorney's office was  
5 established with Wade Swanson, Esq., as the director.  
6

7           30.     On December 31, 2008, Thomas and the Sheriff commenced a declaratory judgment  
8 action against the Board over their authority to hire lawyers. *Thomas and Arpaio v. MCBOS*, CV  
9 2008-033194.

10          31.     Thomas Irvine represented the Board in the suit.

11          32.     MCAO was represented by outside counsel.

12          33.     Thomas sent a December 5, 2008 letter to Supervisor Kunasek.

13          34.     Thomas sent a December 5, 2008 letter to County Manager Smith, Deputy Manager  
14 Wilson, and chief Financial Officer Manos.  
15

16          35.     On November 30, 2009, Judge Gary Donahoe set a hearing to occur on December 9,  
17 2009.

18          36.     On December 1, 2009, Thomas and Aubuchon filed a federal civil RICO action  
19 against various defendants (the "RICO" case).  
20

21          37.     The plaintiffs in the RICO case were Thomas and Sheriff Joe Arpaio in their official  
22 capacities. Lisa Aubuchon signed the complaint.

23          38.     Many of the defendants filed motions to dismiss the RICO case.

24          39.     The RICO action was voluntarily dismissed on March 11, 2010.

25          40.     In January 2010, a grand jury returned an indictment charging Supervisor Wilcox  
26 with numerous crimes.

1           41.     In February 2010, Judge Leonardo ruled that Thomas and his office could not serve  
2 as prosecutors in the Wilcox case.

3           42.     On December 7, 2009, a Maricopa grand jury returned a second grand jury indictment  
4 against Stapley (*Stapley II*).

5           43.     The court dismissed *Stapley II*, without prejudice, on motion of the State on March  
6 15, 2010.

7           44.     A direct criminal complaint was filed against Judge Donahoe on December 9, 2009.

8           45.     In March 2010, Gila County Attorney Daisy Flores agreed to review the *Wilcox* and  
9 *Stapley II* matters which had been dismissed by MCAO.  
10

11           **II.     CONTESTED ISSUES OF FACT AND LAW THAT COUNSEL AGREE ARE**  
12           **MATERIAL OR APPLICABLE.**

13           1.     Whether Thomas violated ER 1.7(a)(2) by advising his client, MCBOS, concerning  
14 MCBOS's authority to independently select legal counsel outside the MCAO because there was a  
15 significant risk that Thomas' representation of the Board was materially limited by his personal  
16 interest.

17           2.     Did Thomas violate ER 1.6(a) by disclosing client confidences in the Judge 14, 2006  
18 press release?  
19

20           3.     Whether Thomas violated ER 3.6(a) by making the June 14, 2008 public statement  
21 about the *Dowling* and *Keen* cases.

22           4.     Whether Thomas and Aubuchon violated ER 4.4(a) by filing charges against  
23 Supervisor Stapley, for no substantial purpose other than to embarrass or burden Stapley.  
24

25           5.     Whether Thomas and Aubuchon violated ER 1.7(a)(1) and/or (2) because they  
26 represented one client, the State, in a criminal case against another client, Supervisor Stapley, and

1 because they had personal interests that created a significant risk that the representation of the State  
2 would be materially limited.

3 6. Whether Thomas and/or Aubuchon violated ER 3.3(a) by stating in a court pleading  
4 that there was a "Chinese Wall" between the criminal and civil divisions at MCAO.  
5

6 7. Whether Thomas and/or Aubuchon violated ER 3.3(a) by stating in a court pleading  
7 that Judge Fields was a complainant against Thomas in a Bar matter.

8 8. Whether Aubuchon violated ER 8.4(d) by asking Judges Mundell, Baca and Fields to  
9 submit to interviews concerning the reasons for appointing Judge Field and their thought processes  
10 related to the appointment of Judge Fields to preside over *Stapley I*.

11 9. Whether Thomas and/or Aubuchon violated ER 8.4(d) by charging misdemeanors  
12 alleged in the indictment in the Stapley indictment knowing that the statute of limitations had run on  
13 those misdemeanors.  
14

15 10. Whether Aubuchon violated ER 8.4(c) by failing to present information to the grand  
16 jury that returned the *Stapley I* indictment that the statute of limitations had run on 44 of the charged  
17 misdemeanors.

18 11. Whether Thomas violated ER 3.6(a) by issuing a public statement on August 24,  
19 2009 about the *Stapley I* matter.  
20

21 12. Whether Thomas violated ER 4.4(a) by sending letters to Supervisor Kunasek and  
22 other county employees stating that payment to Mr. Irvine's firm would be unlawful and may give  
23 rise to actions to recover the funds for no substantial purpose other than to embarrass or burden such  
24 person.  
25  
26

1           13.     Whether Thomas and/or Aubuchon violated ER 4.4(a) by directing a grand jury  
2 subpoena to the County, and/or by making public records requests to the County that had no  
3 substantial purpose other than to embarrass or burden the County or its employees.

4           14.     Whether Thomas and/or Aubuchon violated ER 1.7(a)(1) and ER 1.7(a)(2) by  
5 representing the State as prosecutors in the Court Tower investigation.  
6

7           15.     Whether Thomas, Aubuchon and/or Alexander violated ER 4.4(a) by pursuing the  
8 RICO case for no substantial purpose other than to embarrass or burden the Defendants.

9           16.     Whether Thomas, Aubuchon and/or Alexander violated ER 3.1 by pursuing the RICO  
10 case without a good faith basis in law or fact that is not frivolous.

11           17.     Whether Thomas, Aubuchon and and/or Alexander violated ER 1.1 by failing to  
12 competently represent their client in the RICO matter.  
13

14           18.     Whether Thomas, Aubuchon and/or Alexander violated ER 1.7(a)(1) and/or ER  
15 1.7(a)(2) in pursuing the RICO case.

16           19.     Whether Thomas, Aubuchon and Alexander violated ER 3.4(c) by predicated the  
17 RICO action in part on alleged Bar complaints or statements to the Bar about Thomas and other  
18 MCAO lawyers, in violation of Arizona Supreme Court Rule 48(1).

19           20.     Whether Thomas, Aubuchon and/or Alexander violated ER 8.4(d) by suing judges in  
20 the RICO case.  
21

22           21.     Whether Thomas and/or Aubuchon violated ER 1.7(a)(1) and/or ER 1.7(a)(2) by  
23 bringing criminal charges against Supervisor Wilcox.

24           22.     Whether Thomas and/or Aubuchon violated ER 4.4(a) by filing criminal charges  
25 against Supervisors Stapley and/or Wilcox for no substantial purpose other than to embarrass and  
26 burden them.

1           23.   Whether Thomas and/or Aubuchon violated ER 1.7(a)(2) by bringing criminal  
2 charges against Stapley in *Stapley II*.

3           24.   Whether Thomas and/or Aubuchon violated ER 3.8(a) by prosecuting criminal  
4 charges against Judge Donahoe that they knew were not supported by probable cause.  
5

6           25.   Whether Thomas and/or Aubuchon violated ER 4.4(a) by prosecuting criminal  
7 charges against Judge Donahoe with no substantial purpose other than to embarrass and burden him.

8           26.   Whether Thomas and/or Aubuchon engaged in conduct involving dishonesty, fraud  
9 deceit or misrepresentation in violation of ER 8.4(c) by filing criminal charges against Judge  
10 Donahoe.

11           27.   Whether Thomas and Aubuchon violated ER 8.4(b) by violating the Arizona perjury  
12 statute in causing Deputy Sheriff Almanza to sign the direct complaint against Judge Donahoe under  
13 oath, and/or by ratifying Almanza's act.  
14

15           28.   Whether Thomas and/or Aubuchon violated ER 8.4(b) by filing the direct complaint  
16 against Judge Donahoe, in violation of 18 U.S.C. §241.

17           29.   Whether Thomas and/or Aubuchon violated ER 1.7(a)(2) in bringing criminal  
18 charges against Judge Donahoe.

19           30.   Whether Thomas and/or Aubuchon violated ER 8.4(d) by charging Judge Donahoe  
20 with crimes in order to compel him to recuse himself from hearing the motion set for hearing on  
21 December 9, 2009.  
22

23           31.   Whether Thomas and/or Aubuchon violated ER 1.7(a)(2) by presenting to a grand  
24 jury on January 4, 2010 evidence relating to the expenditure of public funds for a so-called "bug  
25 sweep" and relating to the alleged hindering of prosecutions and obstruction of the investigation of  
26 the Court Tower.



1           32. Whether Aubuchon violated ER 8.4(c) by failing to tell Daisy Flores, the County  
2 Attorney of Gila County that the grand jury in the "bug sweep" and Court Tower investigation had  
3 voted to end the inquiry.

4           33. Whether Thomas, Aubuchon and Alexander violated Rules 53(d) and 53(f) by failing  
5 to cooperate during the screening investigation.  
6

7           34. If a respondent committed a violation of a rule did the respondent have one of the  
8 mental states in the ABA *Standards for Imposing Lawyer Sanctions* in determining the sanction to  
9 be imposed as to such violation?

10           35. If a violation occurred, what was the actual or potential injury caused by the  
11 violation?  
12

13           36. What aggravating or mitigating factors apply?

14           By stipulating to these statements of the issues, no Respondent is conceding that any factual  
15 statement is indeed a fact. The parties agree that, with the exception of the stipulated facts set forth  
16 above, all of the facts alleged in the Complaint are contested.

17           **III. SEPARATE STATEMENTS BY EACH PARTY OF OTHER ISSUES OF FACT**  
18           **AND LAW BELIEVED BY THE PARTY TO BE MATERIAL.**

19           **A. IBC's Separate Statement of Issues of Fact and Law Believed to Be Material.**

20           Independent Bar Counsel ("IBC") asserts that all of facts alleged in the Complaint are  
21 material and applicable. A separate statement of the facts IBC believes to be material is attached  
22 hereto as Exhibit A. IBC submits the following issues of law to be material.

23           **1. Whether Respondents Violated the Charged Ethical Rules and Rule 53.**

24           *Conflict of Interest.* IBC charges the Respondents with violation of ER 1.7(a) in Claims One,  
25 Five, Fourteen, Eighteen, Twenty-One, Twenty-Three, Twenty-Nine, and Thirty-One. The Rule  
26

1 provides: "Except as provided in paragraph (b) [which concerns client consent], a lawyer shall not  
2 represent a client if the representation involves a concurrent conflict of interest. A concurrent  
3 conflict of interest exists if: (1) the representation of one client will be directly adverse to another  
4 client; or (2) there is a significant risk that the representation of one or more clients will be  
5 materially limited by the lawyer's responsibilities to another client, a former client or a third person  
6 or by a personal interest of the lawyer." *See, e.g., Matter of Murphy*, 188 Ariz. 375, 936 P.2d 1269  
7 (1997); *Matter of Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987); *Matter of Mercer*, 133 Ariz. 391, 652  
8 P.2d 130 (1982).

10 *Use of Improper Methods.* IBC charges the Respondents with violations of ER 4.4(a) in  
11 Claims Four, Twelve, Thirteen, Fifteen, Twenty-Two, and Twenty-Five. The Rule provides: "In  
12 representing a client, a lawyer shall not use means that have no substantial purpose other than to  
13 embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the  
14 legal rights of such a person." *See, e.g., Matter of Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993).

16 *Prejudice to the Administration of Justice.* IBC charges Respondents with violations of ER  
17 8.4(d) in Claims Eight, Nine, Ten, Twenty, and Thirty. The Rule provides: "It is professional  
18 misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."  
19 *See, e.g., Matter of Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994).

21 *Commission of Criminal Acts.* IBC charges Respondents with violations of ER 8.4(b) in  
22 Claims Twenty-Seven and Twenty-Eight. The Rule provides: "It is professional misconduct for a  
23 lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or  
24 fitness as a lawyer in other respects." *See, e.g., Matter of Savoy*, 181 Ariz. 368, 891 P.2d 236  
25 (1995).

1       *Extrajudicial Statements.* IBC charges Respondent Thomas with violations of ER 3.6(a) in  
2 Claims Three and Eleven. The Rule provides: "A lawyer who is participating or has participated in  
3 the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer  
4 knows or reasonably should know will be disseminated by means of public communication and will  
5 have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."  
6 *See, e.g., Lawyer Disciplinary Board v. Sims*, 212 W.Va. 463, 574 S.E.2d 795 (2002).

8       *False Statements to the Court.* IBC charges Respondents Thomas and Aubuchon with  
9 violations of ER 3.3(a)(1) in Claims Six and Seven. The Rule provides: "A lawyer shall not  
10 knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement  
11 of material fact or law previously made to the tribunal by the lawyer." *See, e.g., In re Alcorn*, 202  
12 Ariz. 62, 41 P.3d 600 (2002).

13       *Dishonesty.* IBC charges Respondents Thomas and Aubuchon with violations of ER 8.4(c)  
14 in Claims Ten, Twenty-Six and Thirty-Two. The Rule provides: "It is professional misconduct for a  
15 lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See, e.g., In*  
16 *re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004).

17       *Prosecuting without Probable Cause.* IBC charges Respondents Thomas and Aubuchon with  
18 violation of ER 3.8(a) in Claim Twenty-Four. The Rule provides: "The prosecutor in a criminal case  
19 shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable  
20 cause." *See, e.g., Shepard v. Fahringer*, 158 Ariz. 266, 269-70, 762 P.2d 553, 569-70 (1988).

21       *Meritless Claims.* IBC charges Respondents Thomas, Aubuchon and Alexander with  
22 violations of ER 3.1 in Claim Sixteen. The Rule provides: "A lawyer shall not bring or defend a  
23 proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact  
24 for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an  
25  
26

1 extension, modification or reversal of existing law. A lawyer for the defendant in a criminal  
2 proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so  
3 defend the proceeding as to require that every element of the case be established.” *See, e.g., Matter*  
4 *of Levine*, 174 Ariz. 146, 171, 847 P.2d 1093, 1118 (1993).

5  
6 *Competence.* IBC charges Respondents Thomas, Aubuchon and Alexander with violation of  
7 ER 1.1 in Claim Seventeen. The Rule provides: “A lawyer shall provide competent representation to  
8 a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation  
9 reasonably necessary for the representation.”

10 *Disobedience of the Rules of a Tribunal.* IBC charges Respondent’s Thomas, Aubuchon and  
11 Alexander with violation of ER 3.4(c) in Claim Nineteen. The Rule provides: “A lawyer shall not  
12 (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on  
13 an assertion that no valid obligation exists.”

14  
15 *Confidences.* IBC charges Respondent Thomas with violation of ER 1.6(a) in Claim Two.  
16 The Rule provides: “A lawyer shall not reveal information relating to the representation of a client  
17 unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out  
18 the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER  
19 3.3(a)(3).”

20  
21 **2. What Sanction Is Appropriate for Thomas and Aubuchon?**

22 Absent aggravating or mitigating circumstances, upon application of the factors set out in  
23 ABA *Standards* 3.0, a sanction under ABA *Standards* 5.2 is generally appropriate in cases involving  
24 public officials who engage in conduct that is prejudicial to the administration of justice. Standard  
25 5.21 provides that disbarment is generally appropriate when a lawyer in an official or governmental  
26 position knowingly misuses the position with the intent to obtain a significant benefit or advantage

1 for himself or another, or with the intent to cause serious or potentially serious injury to a party or to  
2 the integrity of the legal process. Compare *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004)  
3 (prosecutor disbarred for presenting false testimony in the prosecution of two defendants charged  
4 with capital murder).

5  
6 The Hearing Panel may also wish to consider as a basis for the sanction of disbarment ABA  
7 *Standards* 4.31 ("Disbarment is generally appropriate when a lawyer, without the informed consent  
8 of client(s): (a) engages in representation of a client knowing that the lawyer's interests are adverse  
9 to the client's with the intent to benefit the lawyer or another, and causes serious or potentially  
10 serious injury to the client; or (b) simultaneously represents clients that the lawyer knows have  
11 adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially  
12 serious injury to a client; or (c) represents a client in a matter substantially related to a matter in  
13 which the interests of a present or former client are materially adverse, and knowingly uses  
14 information relating to the representation of a client with the intent to benefit the lawyer or another,  
15 and causes serious or potentially serious injury to a client."); ABA *Standards* 6.11 ("Disbarment is  
16 generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement,  
17 submits a false document, or improperly withholds material information, and causes serious or  
18 potentially serious injury to a party, or causes a significant or potentially significant adverse effect  
19 on the legal proceeding."); ABA *Standards* 7.1 ("Disbarment is generally appropriate when a lawyer  
20 knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to  
21 obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client,  
22 the public, or the legal system.").

23  
24 IBC submits that the following aggravating factors apply to the sanction for Thomas and  
25 Aubuchon.  
26

1        *Dishonest and Selfish Motive.* ABA Standards 9.22(b) allows the Hearing Panel to consider  
2 in aggravation whether Respondents Thomas and Aubuchon had a dishonest and selfish motive.  
3 *See, e.g., In re Peasley*, 208 Ariz. At 37, 90 P.3d at 774 (prosecutor's dishonest and selfish motive  
4 was demonstrated by his intentionally and repeatedly presenting false testimony solely for the  
5 purpose of obtaining convictions and subsequent death penalties for the defendants). *Cf. People v.*  
6 *Pautler*, 35 P.3d 571, 585-86 (Colo. 2001) (finding that prosecutor who misrepresented himself to a  
7 suspect as a public defender was motivated in part by gaining an advantage in subsequent legal  
8 proceedings, which supported the existence of the aggravating factor of dishonest or selfish motive).  
9

10        *Multiple Offenses.* ABA Standards 9.22(d) concerns the factor of multiple offenses. *See,*  
11 *e.g., In re Moak*, 205 Ariz. 351, 352, 356, 71 P.3d 343, 344, 348 (2003) (respondent's commission of  
12 over a dozen ethical violations supported application of the aggravating factor of multiple offenses).  
13

14        *Bad Faith During Investigation.* ABA Standards 9.22(e) applies when a respondent fails to  
15 cooperate in good faith with the State Bar. *Matter of Riddle*, 175 Ariz. 379, 381-82, 857 P.2d 1233,  
16 1235-36 (1993) (respondent asked that his response to the complaint remain confidential, then failed  
17 to submit a non-confidential response and otherwise failed to participate in the disciplinary matter);  
18 *Matter of Fresquez*, 162 Ariz. 328, 329-31, 783 P.2d 774, 775-77, 781 (1989) (respondent prepared a  
19 false, backdated letter for the State Bar during its investigation, submitted a false affidavit to the bar,  
20 and lied under oath during the disciplinary proceedings).  
21

22        *Refusal to Acknowledge Wrongful Nature of Conduct.* ABA Standards 9.22(g) addresses  
23 whether a respondent is willing to admit the wrongful nature of what he or she has done. *Matter of*  
24 *Levine*, 174 Ariz. 146, 171, 847 P.2d 1093, 1118 (1993) (respondent refused to acknowledge  
25 wrongfulness of his pressing, over a period of nine years, burdensome litigation against his ex-  
26 partner and others related to the dissolution of his law firm).

1           *Substantial Experience in the Practice of Law.* ABA Standards 9.22(i) requires the Hearing  
2 Panel to consider the effect of a respondent's experience. *In re Zwanda*, 208 Ariz. 232, 238-39, 92  
3 P.3d 862, 868-69 (2004) (prosecutor's many years of experience should have taught him to conform  
4 his conduct to the Rules); *In re Peasley*, 208 Ariz. at 37, 90 P.3d at 774 (same).

5           *Proportionality.* The last step in determining if a particular sanction is appropriate is to  
6 assess whether the discipline is proportional to the discipline imposed in similar cases. In the  
7 *Peasley* case, the prosecutor was disbarred for having intentionally presented false testimony in a  
8 capital murder case, in a misguided effort to obtain a conviction at any cost. *In re Peasley*, 208 Ariz.  
9 at 27, 29-30, 44. 90 P.3d at 774, 766-67, 781. Some of the same aggravating factors were present in  
10 *Peasley* as are present here: substantial experience in the practice of law, dishonest and selfish  
11 motive, and multiple offenses. *In re Peasley*, 208 Ariz. at 36-38, 90 P.3d at 773-775.

## 12           **2. What Sanction Is Appropriate for Alexander?**

13           ABA Standard 5.22 provides: "Suspension is generally appropriate when a lawyer in an  
14 official or governmental position knowingly fails to follow proper procedures or rules, and causes  
15 injury or potential injury to a party or to the integrity of the legal process."). ABA Standards 4.52  
16 provides: "Suspension is generally appropriate when a lawyer engages in an area of practice in  
17 which the lawyer knows he or she is not competent, and causes injury or potential injury to a client."  
18 ABA Standards 6.22 provides: "Suspension is appropriate when a lawyer knowingly violates a court  
19 order or rule, and there is injury or potential injury to a client or a party, or interference or potential  
20 interference with a legal proceeding." By knowingly pressing forward with the RICO case without a  
21 factual or legal basis, Respondent Alexander engaged in misconduct that requires discipline pursuant  
22 to these *Standards*.

1 The aggravating factors that apply are her multiple offenses (ABA *Standards* 9.22(d)), her  
2 bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules  
3 or orders of the disciplinary agency (ABA *Standards* 9.22(e)), and her refusal to acknowledge the  
4 wrongful nature of her conduct (ABA *Standards* 9.22(g)).

5  
6 The Arizona Supreme Court has suspended attorneys in similar circumstances. *In re*  
7 *Zawada*, 208 Ariz. 232, 92 P.3d 862 (2004).

8 **B. Respondent Thomas' Separate Statement of Issues of Fact and Law Believed to Be**  
9 **Material.**

10 1. Whether Thomas "failed to cooperate" in violation of Rule 53 or engaged in bad faith  
11 by engaging lawyers to defend him who challenged the scope and manner of the screening  
12 investigation?

13 2. Can the Bar discipline a lawyer for failing to cooperate consistent with the Due  
14 Process Clause of the Arizona and federal constitutions?

15 3. Whether there was probable cause to support the charges in the indictments in Stapley  
16 I and II, and Wilcox.

17 4. Does a prosecutor who brings a criminal case supported by probable cause have a  
18 "substantial purpose other than to harass, delay or burden" the defendant?

19 5. Was it reasonable for Thomas to rely on *State v. Brooks*, 126 Ariz. 395, 616 P.2d 70  
20 (App. 1980) when concluding his office did not have a conflict prosecuting Supervisors Stapley and  
21 Wilcox?

22 6. Was it reasonable for Thomas to rely on the advice he received from lawyers, both  
23 within and outside the MCAO, when commencing a declaratory judgment against the Board,  
24 authorizing the filing of the RICO complaint and authorizing the bringing of criminal charges  
25 against Judge Donahoe.

26 7. Is the expression "prejudicial to the administration of justice" unconstitutionally



1 vague on its face?

2 8. Is the expression "prejudicial to the administration of justice" unconstitutionally  
3 vague as applied here by the Bar?

4 9. Is the Bar engaging in selective prosecution by seeking discipline against Thomas,  
5 Aubuchon and Alexander for filing the RICO action but not against any of the other lawyers, both  
6 within and outside the MCAO, who participated in the commencement and prosecution of the  
7 action?

8 10. Is a person shielded from liability under federal RICO laws by Supreme Court  
9 Rule 48(l)?

10 11. Is a judge shielded from liability under federal RICO laws by state common law  
11 judicial immunity?

12  
13 **C. Respondent Aubuchon's Separate Statement of Issues of Fact and Law Believed to Be  
14 Material.**

15 Respondent Lisa M. Aubuchon, pursuant to the Rules of The Arizona Supreme Court, the  
16 Arizona Rules of Civil Procedure, and any other applicable rules, hereby submits that the following  
17 issues of fact and law are material in this matter and submits the issues rise to a denial of due process  
18 and deprivation of her Constitutional Rights under the Constitution of the United States and of the  
19 State of Arizona. Respondent Lisa M. Aubuchon, still just days before the hearing is scheduled to  
20 start: has not been fully and properly advised of the charges against her; she has not been given the  
21 rights to which she is entitled to under the Rules; and she has not been adequately informed of the  
22 testimony and evidence that may be presented against her. She has never been fully and properly  
23 charged; does not have a complaining witness against her; does not have a proper complaint filed  
24 against her; has been made the victim of, and scapegoat for, the Political Misconduct of the non-  
25 party individuals and entities who are behind the charges. She has been denied equal protection  
26 under the law; and has been forced to fight for her professional life while being deprived of counsel  
and being intimidated for attempting to obtain justice. She respectfully submits that the following

1 MATERIAL FACTUAL AND LEGAL ISSUES should be considered as being material herein.  
2 Further, she moves the presiding disciplinary judge and the panel to dismiss all of the disciplinary  
3 charges against her on the grounds that she has been denied due process of law in this proceeding in  
4 numerous ways:

- 5 • She was deliberately denied counsel at critical early stages of this proceeding;
- 6 • She has been deliberately and repeatedly denied access to tangible material  
7 evidence that is critical to her defense; and
- 8 • She has been purposefully denied funds required for effective litigation  
9 support throughout this proceeding—a protection that has been afforded to  
10 virtually every county *witness*.
- 11 • The disciplinary process, as written and as applied, denies the right of  
12 confrontation and the right to effective assistance of counsel.

13 The history of these multiple denials of due process and fundamental fairness is as follows:

14 Respondent Lisa Aubuchon was charged with disciplinary violations in early 2010. Because  
15 she had been a Maricopa County employee during all of the events that give rise to the violations  
16 charged, as a matter of policy, practice and law, Lisa Aubuchon was entitled to legal representation  
17 at the county's expense. Consistent with those legal requirements, county-paid counsel was initially  
18 retained for Ms. Aubuchon.

19 However, when the proceedings reached the screening process stage, where the assistance of  
20 counsel was critical to Ms. Aubuchon's defense, then-interim Maricopa County Attorney Richard  
21 Romley fired her attorney. Ms. Aubuchon was then forced to go through the balance of the  
22 screening process without an attorney.

23 Near the end of the screening process stage, additional charges were made against Ms.  
24 Aubuchon and, because she did not then have counsel, she was charged with failure to cooperate.  
25 Denial of counsel continued throughout the probable cause and charging stages, and Ms. Aubuchon  
26 was threatened with a default judgment while she was deprived of county-hired counsel.

1 Ms. Aubuchon was finally able to find representation, who has assisted her *pro bono* in this  
2 matter and has not been reimbursed for the very substantial out-of-pocket expenses, such as  
3 deposition transcript costs, that are an ordinary and necessary part of a complex case such as this.  
4 Moreover, because of the extraordinary demands and compressed schedule in this case, Ms.  
5 Aubuchon's attorney is precluded from engaging in any incoming-producing work—because this  
6 case must be given the highest priority.

7 This economic duress is a tool used by Maricopa County to force Lisa Aubuchon to face a  
8 professional death penalty without the benefit of counsel. It is unconscionable and flies in the face  
9 of everything for which her prosecutor—the State Bar of Arizona—should stand.

10 This particular deprivation is one element in a broader scheme initiated by the Board of  
11 Supervisors as a part of their quest to control the County Attorney's division and handpick their own  
12 civil counsel, and it has resulted in greater and more enduring wrongs than just the dismissal of  
13 actionable felony prosecutions of powerful political figures.

14 Another part of this scheme involves the deliberate withholding of relevant evidence by the  
15 Maricopa County Attorney's Office. This tangible evidence includes documents that were presented  
16 during Ms. Aubuchon's lengthy employment dispute with the Maricopa County Attorney's Office  
17 that concerned the very same subjects that are at issue in this disciplinary proceeding. Specifically,  
18 Ms. Aubuchon was locked out of her office by then-acting county attorney Richard Romley and  
19 others under his direction. She was denied access to all of her working files that would assist her in  
20 reviewing the facts, in refreshing her memory of important events that occurred over several years,  
21 and in presenting a cogent and effective defense. Ms. Aubuchon has timely objected to this denial of  
22 due process and has attempted—without success—to get it corrected. This denial of due process has  
23 substantially prejudiced her in her defense in these proceedings, is sufficiently egregious to amount  
24 to a denial of fundamental fairness, and warrants dismissal of this disciplinary proceeding against  
her.

25 The scheme also includes depriving Ms. Aubuchon of evidence of communications between  
26 she and the Maricopa County Sheriff's Office, and between she and other Maricopa County

1 departments with which she communicated and worked, with respect to matters that have become  
2 the subjects of this disciplinary proceeding. By way of example only, throughout the "merit  
3 hearing" in Ms. Aubuchon's employment dispute, she was denied access to records, witnesses, and a  
4 transcript of the proceedings until weeks after the decision was made by the commission; and she  
5 was required to have a hearing before employees and appointed individuals who represented  
6 Maricopa County, the adverse party in the merit hearing. So out of touch with fundamental fairness  
7 was the merit hearing, that the Final Order Denying [Ms. Aubuchon's] Appeal *identified the*  
8 *respondent as being the Maricopa County Sheriff's office.*

9 At the merit hearing, the Maricopa County Board of Supervisors, who appointed the merit  
10 hearing commissioners and the employees directly supervised by the Maricopa County Board of  
11 Supervisors, hired attorneys paid by the Board of Supervisors to present Maricopa County's case to a  
12 "independent mediator/judge" who was also paid by Maricopa County. Because Ms. Aubuchon was  
13 denied access to tangible evidence and documents in the merit hearing, she cannot disclose a  
14 complete list of all documents and tangible evidence she may use in these disciplinary proceedings.

15 Notwithstanding that Ms. Aubuchon was refused this access, Bar Counsel in this proceeding  
16 has communicated with and obtained information and documents from the United States Attorney's  
17 Office, the Arizona Attorney General's Office, many Arizona County Attorney's Offices and the  
18 Maricopa County Sheriff's Office, and he has not disclosed the information he has obtained or the  
19 documents or tangible evidence he has reviewed and/or been provided by these agencies. Thus, the  
20 denial of due process initiated by Maricopa County has extended to and permeates these disciplinary  
21 proceedings.

22 Full, complete and good faith disclosure requires that all of this information and all of these  
23 tangible items should long ago have been disclosed, including without limitation notes, writings, and  
24 any other materials in Bar Counsel's possession. Ms. Aubuchon has requested, and again requests,  
25 that all of this information be disclosed as required by the rules. Likewise, fundamental fairness  
26 requires that all exculpatory information be disclosed, but *none* of Bar Counsel's disclosures contain  
any disclosure of exculpatory information.

1 Ms. Aubuchon respectfully submits that the pretrial disclosures made by Bar Counsel are not  
2 what is required or intended by the rules. Instead, Bar Counsel has disclosed a "tentative" list of  
3 documents that he may use at the trial of this case. Not all of the documents on this list were  
4 disclosed, and not all are referenced by bates number or other identification. Bar Counsel states that  
5 he is in possession of copies of some of the documents, which he lists by document numbers, but  
6 then states that he "also has obtained electronic access to pleadings, motions, briefs and orders in  
7 various underlying matters. Independent Bar Counsel is not in physical possession of such  
8 documents, and those documents are not listed by document number." This is not a proper disclosure  
9 under the rules. Bar Counsel's statement that "[t]he Bates numbers after a document indicate what  
10 PDF file the document is located in on the DVD that is being supplied with these Initial Disclosures"  
11 is not in compliance with the rules. It is, instead, a vague attempt to identify numerous haystacks in  
12 which needles may be hidden.

13 Although Ms. Aubuchon has and does reserve her right to object to any tangible evidence or  
14 documents that Bar Counsel may attempt to use in these proceedings under the vague disclosure that  
15 he made under section V. in his disclosures, this is a further extension of the continuing denial of due  
16 process to which Lisa Aubuchon has been subjected.

17 Underscoring how Lisa Aubuchon's right to due process of law has been trampled, the Board  
18 of Supervisors has hired attorneys to represent all but two of the witnesses deposed in this case. This  
19 has caused the facts and circumstances underlying the disciplinary charges to be concealed, rather  
20 than revealed. It has also resulted in the expenditure of tens, if not hundreds, of thousands of  
21 taxpayers' dollars to *prevent* disclosure of wrongful conduct by Maricopa County representatives.  
22 Compounding that, many pleadings in this action have been sealed, so the acts and omissions of  
23 County, State and other actors, have been concealed from the same scrutiny to which Lisa Aubuchon  
is being subjected. It has been forgotten who and what this case was all about.

24 To begin righting these wrongs, the Court should dismiss this case in its entirety or, in the  
25 alternative, mandate that the acts and omissions of all of the actors be brought to light, to make this  
26 truly a public trial, so the light of truth can be shone on Maricopa County's *actual* history.

1           This conduct does not promote justice. This conduct does not portray attorneys in a better  
2 light. This conduct simply turns off the lights of fairness and encourages tyrants to use elected office  
3 for their own gain and misuse of power. They then win by using the Arizona Bar Association, the  
4 Honorable Courts of Arizona, and the powerful press to destroy the respondents.

5           Beyond the overarching denials of due process described above, Lisa Aubuchon specifically  
6 objects to Bar Counsel presenting any information in aggravation of alleged ethical violations, and  
7 cites that intention as yet another denial of due process, because:

8           (1)     There is no "evidence," by any accepted or applicable legal definition, that  
9 supports any claim for aggravation;

10          (2)     Bar Counsel has not disclosed any evidence that would be used to prove  
11 aggravation, and his disclosures are not in compliance with the rules;

12          (3)     Ms. Aubuchon has not been advised in pleadings or discovery what alleged  
13 evidence, if any, exists or may be offered to prove that she acted:

- 14                 • dishonestly
- 15                 • with a selfish motive
- 16                 • in a pattern of misconduct
- 17                 • in bad faith obstruction of the disciplinary process by intentionally  
18 failing to comply with rules or orders of the disciplinary agency;
- 19                 • without substantial experience in the practice of law
- 20                 • that she refused to acknowledge the wrongful nature of any conduct
- 21                 • that she committed multiple offenses.

22   Although these matters will all be presented by formal objections at the proper time, they are further  
23 evidence of the fundamental unfairness of this proceeding. Likewise, Ms. Aubuchon will, if  
24 necessary, present any and all mitigation evidence permitted. Respondent has listed her potential  
25 mitigation witnesses and potential mitigation exhibits. If it becomes necessary to present this  
26 evidence, Ms. Aubuchon will put on evidence of her competency to practice law, her record of  
practicing law, her honesty, integrity, her values, her care for clients, her responsibility, her

1 dedication, her family, her work ethic, her diligence, her responsibility as a citizen, and her  
2 community work. She will prove who and what she is and that all she ever did was her job and tried  
3 to fulfill her obligations to the citizens of Maricopa County.

4 Section IX of the disclosure rules provides further evidence of the fundamental unfairness to  
5 which Lisa Aubuchon is being subjected, and she objects to the requirement under section IX of the  
6 disclosure rules as being unconstitutional as a denial of due process and equal protection. The Bar  
7 Counsel does not have a similar requirement in his disclosures. Bar Counsel has the burden of proof  
8 and has not met the requirements of the rules that pertain to full and adequate disclosures. Yet, Ms.  
9 Aubuchon is being required to answer charges that are not clear and specific, at the same time that  
10 she is under the threat of potential criminal charges based upon the vagueness of the complaint, the  
11 non-responsive disclosures, Bar Counsel's public statements, press releases, undisclosed  
12 communications with law enforcement agencies including the Arizona Attorney General's office and  
13 the United States Attorney's Office, his references to a pending grand jury, and his failure to fully  
14 and adequately advise Ms. Aubuchon of the nature and extent of the charges against her.

15 In an attempt to mitigate, in some small measure, the denial of due process to Ms. Aubuchon,  
16 and without waiving any formal objections she may have, Ms. Aubuchon submits the following in  
17 response to the request for the factual and legal basis upon which she will contest the allegations in  
18 the complaint at the hearing of this matter:

19 1. Respondent denies there is a factual basis upon which the State can prove the  
20 allegations in the complaint;

21 2. Respondent denies there is a legal basis that will support the State's allegations in the  
22 complaint;

23 3. Respondent alleges that the complaint does not state a claim, either factually or  
24 legally, that will support the allegations against her;

25 4. Respondent alleges that the complaint is vague, does not adequately advise the  
26 Respondent of her alleged acts and/or omissions, is full of conclusions, speculation, presumptions  
and perceptions that do not constitute a legal or factual basis for the charges brought against her;

1           5.       Respondent alleges that the complaint is factually incorrect, is based upon incorrect  
2 perceptions of witnesses, and is based upon witnesses who have motives and purposes to harm or  
3 damage the Respondent;

4           6.       Respondent alleges that the agenda of the powers that were and are the decision  
5 makers for the State Bar of Arizona, together with the political atmosphere at the time these  
6 allegations were made, rather than actual or provable historical facts, were the motivating factors in  
7 the charges brought, in the changing of the procedural and substantive rules for the attorney  
8 disciplinary process, and in the nature and extent of the charges.

9           7.       The politically charged atmosphere that existed at the time of these charges being  
10 brought involved litigation and controversy between three major elected Maricopa County offices:  
11 the Board of Supervisors, the Sheriff, and the County Attorney; and flowed over to two elected State  
12 offices: the Attorney General and the State Treasurer. This litigation also involved several Maricopa  
13 County Superior Court Judges, several prominent Arizona attorneys, several County Attorneys in  
14 counties adjacent to Maricopa County, and the biggest governmental building project in Maricopa  
15 County, the Court Towers Project.

16           8.       One of the major points of contention was who controlled the hiring of private civil  
17 attorneys in matters involving Maricopa County. Different Maricopa County elected and appointed  
18 officials had divergent views, and their "executive session" intramural struggle for control led to  
19 opposing positions that, when push came to shove, resulted in litigation. Accusations were made,  
20 some against Lisa Aubuchon, which were false, without foundation, and unjustified. These  
21 accusations resulted in the allegations in this proceeding.

22           9.       The Maricopa Board of Supervisors, using their position as controllers of the budget,  
23 took the Civil Division of the County Attorney office away from the elected County Attorney and  
24 hired private counsel, who they had hired in violation of procurement procedures, to basically form a  
25 new civil division. This matter was later resolved by the Arizona Court of Appeals, but still the  
26 Maricopa Board of Supervisors would not correct the situation.



1           10.     The background and details of all of the ongoing political battles referred to above are  
2 all relevant to a complete, objective, factual, accurate, and fair understanding of the accusations that  
3 have been made in this proceeding. *Without that complete context, the truth cannot and will not be*  
4 *known, and due process will be forever denied.*

5           11.     The complaint is inadequate to put the Respondent on notice of each and every  
6 factual and legal issue charged, and without waiving any objections, this pleading will put the Bar  
7 Counsel on notice that the Respondent:

- 8                   i.   Denies any and all wrongdoing;
- 9                   ii.   Contends that the State Bar has the burden of proof and cannot prove the  
10                       allegations;
- 11                  iii.   Contends that the State Bar cannot prove its case by the use of alleged  
12                       statements attributed to the Respondent;
- 13                  iv.   The use of the term "Independent Bar Counsel" is inappropriate. These  
14                       Counsel are not independent; they represent one side; they are not licensed  
15                       to practice law in Arizona; they were given a blank check of money, costs,  
16                       expenses, and manpower; they were given a blank check to investigate  
17                       undefined matters; they could investigate whatever they wanted; they got a  
18                       probable cause ruling from a single panelist; they got the case made  
19                       public, they use the address of the Colorado Supreme Court; they  
20                       reference the Arizona Supreme Court as if the Court appointed them  
21                       because they are experts – when in fact they are not. Respondent asks that  
22                       the presently labeled Independent Bar Counsel be treated as ordinary  
23                       counsel in an ordinary case and not labeled as being Independent or  
24                       employees of the Court. They are not entitled to some special designation.
- 25                  v.   It is unfair to have an investigation conducted by the individuals who are  
26                       the lawyers who represent the side that has the burden of proof. This is  
                     part of the reason why there is, virtually always in every jurisdiction in a

1 democratic society, a separation of the investigative role from the  
2 prosecutorial role. This is why, in a democratic system, police officers are  
3 not prosecutors. If they have a vested interest in the prosecution of the  
4 case, such as developing the case, then they cannot be fair and impartial in  
5 their role as investigators. When the police officers investigate their cases  
6 they are subject to laws, regulations and common law that regulates the  
7 scope and fairness and procedures they must follow. They are subject to  
8 cross-examination in the cases they investigate. They turn the  
9 investigation over to the prosecutors who then present the evidence to the  
10 fact finders. The person charged with the violation is then given a right to  
11 a trial. At the trial the person charged is given the right to confront the  
12 witnesses against them, including the investigators who develop the case.  
13 The framers of the constitution recognized this need for confrontation  
14 when they drafted the Sixth Amendment that gives persons accused of  
15 wrongdoing the right to confront the witnesses against them. This  
16 constitutional right to confront witnesses applies to investigator under  
17 *Crawford v. Washington*, 543 U.S. 1095, 125 S. Ct. 961, 160 L.Ed. 2d  
18 909, decided by the United States Supreme Court in 2005—and should  
19 apply no less in a case where a professional death penalty is sought.  
20 *Crawford* case stands, in part, for the premise: “[W]here testimonial  
21 statements are at issue, the only indicium of reliability sufficient to satisfy  
22 constitutional demands is confrontation.” Lisa Aubuchon has been wholly  
23 denied that right by the process and protection given to Bar Counsel to act  
24 as both investigator and prosecutor, and then to hide behind attorney  
work-product privilege.

- 25 vi. The rules that govern this proceeding provide for a “Screening” process  
26 and a determination of “probable cause”. This screening process and

1 probable cause determination is intended to result in disclosures that allow  
2 a person charged to be fully informed as to the nature and extent of the  
3 violations alleged. The probable cause process must meet due process  
4 requirements. Lisa Aubuchon intends to contest and impeach the  
5 investigation: how it was conducted; how it deprived her of due process;  
6 how statements were taken but not recorded or memorialized; how no  
7 exculpatory evidence was ever revealed; and how the investigation was  
8 one-sided. The facts should be developed by a fair and impartial  
9 investigation, which compiles all of the facts, including exculpatory facts,  
10 and presents them to the probable cause panel. The developed facts  
11 should be just that- "facts" and not simply conclusions of the investigative  
12 body. This is especially true in this proceeding. The probable cause panel  
13 must be able to examine the "facts" that support probable cause. This  
14 includes out of court statements of the witnesses upon the probable cause  
15 is based. The procedure utilized in the pending proceeding is flawed and  
16 prejudicial to the Respondent. The probable cause fact finder was not  
17 presented with sufficient facts to support a probable cause finding. The  
18 single panelist was simply presented with a one sided conclusion  
19 statement of the Bar Counsel's version of the case. The Bar Counsel was  
20 the investigator. There was no representation of Respondent Aubuchon  
21 (because the county fired her lawyers) during this stage of the process.  
22 The investigators simply provided a 76-page report, dated November 23,  
23 2010, entitled "Probable Cause Report" Requesting Authority to File a  
24 Formal Complaint. The investigators also filed an undated four-page  
25 document entitled "Summary of various matters referred to by  
26 Independent Bar Counsel". Also filed was an undated six-page undated  
report entitled "Summary of Alleged Ethical Violations". The probable

1 cause documents identified above speak for themselves and read like a  
2 brief filed by the prosecution, as stated above, "the panelist was simply  
3 presented with a one-sided statement, full of conclusions and absent facts,  
4 of the Independent Bar Counsels version of the case. The IBC was the  
5 investigator." Little or no factual information was submitted, just an  
6 outline of accusations against the Respondents, and "conclusions," if that  
7 is even the correct use of the term, were motivated by political agenda.

- 8 vii. The procedure here is most closely akin to, albeit more procedurally  
9 offensive than, the NCAA infractions procedure pre-1990, when NCAA  
10 investigators made handwritten notes during unsworn and unrecorded  
11 interviews, then typed up those notes into charges of violations that cost  
12 major universities millions of dollars and opportunities for young athletes,  
13 who had never been involved, to compete for their schools. What  
14 happened in this case is worse. Here, Bar Counsel interviewed the  
15 witnesses and did not record, write down, or otherwise preserve the  
16 statements. Perhaps this was done in order to avoid rules of disclosure or  
17 for some other reason. Whatever the reason, it undermined the  
18 Respondents' rights to confront the witness. Without the investigators  
19 disclosing the specific contents of the investigation to the Respondents,  
20 including the statements, writings, notes, etc., made by the investigators of  
21 the information from the witnesses, the Respondents were and are  
22 prejudiced and denied due process. If only the investigators (now wearing  
23 their Lawyer hats) know what the witness is going to say and it has not  
24 been disclosed to the Respondent, the Respondents' rights to due process  
25 is destroyed because the Respondents' right to confrontation and effective  
26 assistance of counsel are denied. The investigators become the lawyers  
and, wearing the lawyer hat, they have all of the information of the

1 investigators. As lawyers, they contend the information is work product  
2 and therefore privileged, because it is the information known only to the  
3 lawyer. Respondent cannot depose the lawyer, cannot call the lawyer as a  
4 witness, and cannot get into the head that is wearing the lawyer hat. The  
5 Respondents are not permitted to confront or cross-examine the  
6 investigators because they no longer exist as available witnesses. When  
7 the testimony of the witness, using Mr. Stapley as an example, is disclosed  
8 for the first time in the trial, without compliance with the disclosure rules,  
9 it violates Respondents' rights and should not be admissible. The failure  
10 to make disclosures becomes the tool for denying cross-examination  
11 material, the basic foundation of the right of confrontation. Failure to  
12 make disclosures ignores the duty to provide exculpatory information. It  
13 is also a denial of effective assistance of counsel—especially if, as here,  
14 Lisa Aubuchon's original attorneys are fired, substantially foreshortening  
15 subsequent counsel's time to prepare. In this case, Respondents present  
16 counsel entered into the case a year after the "Independent Bar Counsel".  
17 As stated, the IBC disclosures are inadequate. The only record of the one  
18 hundred plus interviews conducted before chargers were filed is in the  
19 head and/or alleged work product of the "Special Independent  
20 Investigator/Independent Bar Counsel"—which Lisa Aubuchon has never  
21 seen and which, despite her request, she is not permitted to see. These  
22 interviews were not produced in accordance with the disclosure rules.  
23 Respondent submits that since Bar Counsel has not produced the  
24 statements and/or the information that each witness has given, and the  
25 only one with the information is Bar Counsel, then producing the witness  
26 for deposition- "an opportunity to cross-examine the witness"- does not  
suffice--because--unless the person taking the deposition gets lucky and

1 asks the right question that produces the evidence that would be fruitful  
2 for cross-examination in these proceeding, this hide and seek/needle in the  
3 haystack game deprives the Respondent of confrontation on the matters  
4 the Bar Counsel knows that he will use in these proceedings. *Thus,*  
5 *between the combined and revised pre-12/31/10 and post-1/1/11 rules of*  
6 *procedure in disciplinary cases, and the orders by which those rules have*  
7 *been interpreted and applied in this case, trial by ambush has been*  
8 *successfully resurrected.* For example, Bar Counsel interviewed a witness,  
9 found out what the witness was going to say to help the prosecution, the  
10 information is not recorded or perpetuated, and the information is not  
11 disclosed. It is blind luck for the person who takes the deposition of that  
12 witness to ask the right questions. If the witness then testifies at hearing  
13 as to what the prosecutor wants to hear—that which remains undisclosed—  
14 the Respondent is prejudiced by not having effective assistance of counsel  
15 as required under the Sixth Amendment. Respondent's counsel will not  
16 know the subject matter the Bar Counsel is relying upon, and Bar Counsel  
17 has never been compelled to disclose the information or to comply with  
18 the disclosure rule. To preserve due process protections, Bar Counsel  
19 should be required to take his lawyer hat off, put his investigator hat on,  
20 disclose the required information so the Respondent is not prejudiced, and  
21 then put his lawyer hat back on, so he and all of the other lawyers in the  
22 case can work professionally to ensure that everyone gets due process and  
adequate representation of counsel.

23 viii. Respondent intends to show the proceedings are unfair and are a denial of  
24 equal protection under the law. Costs of investigation, budget of  
25 investigation, costs of screening, costs of Probable Cause Panelist, budget  
26 of entire proceedings, cost of entire proceedings, budget for travel, cost of

1 travel, cost of travel for entire proceedings, in other words the entire cost  
2 of the proceedings, the amount paid by taxpayers, the amount paid by the  
3 State Bar of Arizona, the approval of the costs and the approval of the  
4 payments, all are factors that must be addressed because of the unique  
5 nature of the proceedings. This may be classified as a unique procedure,  
6 but it has to be reasonable. Who has authorized the funds to provide a blank  
7 check to the IBC? Where in the records of the State Bar is the  
8 authorization to charge its members funds to pay the expenses of this  
9 proceeding? Where in the State of Arizona budget for the Supreme Court  
10 are these expenditures authorized and approved? Does Bar Counsel just  
11 spend and send a bill and no one worries about where the money is  
12 coming from? We, the participants, can see it is not only unique, it should  
13 be impossible. If we do not address this matter who will? Respondent  
14 submits this unprecedented procedure is wrong, prejudicial, and can only  
15 be questioned and, if necessary, stopped from within. One thing is clear—  
16 it is highly prejudicial to Lisa Aubuchon. Respondent must be permitted,  
17 on the record, to show the prejudice, to show the unfairness, and to show  
18 the unequal protection under the law.

- 19 ix. As a part of her compensation as a long-term employee of the Maricopa  
20 County Attorney's Office, Lisa Aubuchon earned and owned a property  
21 right to be provided a lawyer, at county expense, to defend her in these  
22 proceedings. Maricopa County cannot deny that duty because, when this  
23 process began, Maricopa County did provide and pay for counsel. As the  
24 proceedings progressed, Ms. Aubuchon's County-hired lawyer worked  
25 diligently to defend her, even taking some matters to the Supreme Court.  
26 Then, as critical deadlines approached, the Maricopa County Attorney  
fired Respondent's attorney and the so-called "Independent Bar Counsel"

1 would not extend deadlines, thereby prejudicing the Respondent. Ms.  
2 Aubuchon was not provided counsel during the middle to the end of the  
3 critical screening process. Ms. Aubuchon was not provided counsel when  
4 new rules were going into effect so she was unable to make any required  
5 motions or to get any required legal advice. Then, when the probable  
6 cause result was reached and served, Ms. Aubuchon did not have a lawyer  
7 to advise her on her options and to take the required legal action for her.  
8 For example, the probable cause panelist not only ruled in favor of Bar  
9 Counsel, he ruled that several new causes of action should be added to the  
10 proposed complaint on the grounds of failure to co-operate. What is  
11 alleged against Ms. Aubuchon on the failure to cooperate count dealt with  
12 her not filing document in a timely manner and not timely providing  
13 written answers to the "Independent Counsel." Both matters occurred  
14 when Ms. Aubuchon did not have a lawyer, because the County had fired  
15 him. Also, when the complaint was finally filed, Ms. Aubuchon still did  
16 not have any counsel. The Presiding Judge set a status conference and  
17 Ms. Aubuchon did not get counsel until a few days before the proceeding  
18 started. Maricopa County, by controlling the budget and establishing  
19 control of the private lawyers hired to represent the Respondents, have  
20 interfered with one of the most sacred of rights – the representation by  
21 counsel. This issue is relevant to the disciplinary proceeding, especially  
22 when the hearings are about the professional responsibility of lawyers and  
23 when said responsibility is intentionally interfered with by the County.  
24 This matter cannot be ignored.

25 This case involves unprecedented charges alleged to have been  
26 made by the Bar Association. It is virtually impossible to avoid the  
sarcastic responses: Really? By whom? Who is/are the Complainants? Is it



1 a person? Is it the public? Is it a special interest? The point is that  
2 Arizona Lawyers, including private practitioners, prosecutors, and judges,  
3 will all pay a big price for this unprecedented regulation of the practice of  
4 law. Judicial Immunity and Prosecutorial Immunity have the same roots  
5 and justification. Will every person of means be permitted to cut off a  
6 potential prosecution by getting a stay, by getting a case transferred to  
7 another county so it can be second-guessed by other prosecutors, or by  
8 having numerous felonies thrown out because there were also  
9 misdemeanors charged, or by the accused claiming to be sorry and not  
10 having meant to break the law, or paying back what was taken in the  
11 crime, therefore, no harm no foul. Prior to the disciplinary charges  
12 brought in these proceedings how many PENDING cases have been  
13 reviewed by prosecutors from another jurisdiction and the cases  
14 dismissed? How many public officials who have been charged with a  
15 crime have had PENDING charges dismissed for an alleged conflict of  
16 interest because the prosecutors office allegedly gave civil advice to a  
17 governmental entity. Lawyers' professionalism is based upon respect for  
18 the law. If the State Bar of Arizona, to which all licensed attorneys must  
19 belong, is used as a vehicle to push one side of a political football up and  
20 down the field in favor of one side over the other, with the costs and  
21 expenses of the one team having the biggest and highest paid players paid  
22 for by the State Bar, and the other team not even having a coach or  
23 uniforms, is that a fair or proper use of the Bar Association funds? Who  
24 authorized this use of these funds? How many prior disciplinary  
25 proceeding have occurred in Arizona for allegations similar to the above  
26 examples: for alleged ethical violations of uncommon interpretations of  
the rules; for alleged ethical violations of uncommon interpretations of

1 handling grand juries, (such as when the County Attorney –Richard  
2 Romley- gets an order to release grand jury records and then has ethical  
3 charges filed against the Respondent for having violated the secrecy of the  
4 grand jury); for alleged ethical violations of uncommon interpretations of  
5 bringing criminal charges by a prosecutor; for alleged ethical violations of  
6 uncommon interpretations of prosecutors judgments of probable cause; for  
7 alleged ethical violations of uncommon interpretations of prosecutors  
8 charging Judges with crimes when the facts have been investigated and  
9 prosecutorial judgment has been exercised. Whatever happened to  
10 Absolute Immunity, to Judicial Immunity, to Prosecutorial Immunity, to  
11 Qualified Immunity, to Quasi-Judicial Immunity, to Prosecutorial  
12 Discretion? This is not to say others have gotten away with misdeeds and  
13 therefore so should Lisa Aubuchon- but rather to say that the facts alleged  
14 do not constitute violations any more than the examples set forth above.

15 x. Relevant case law will be cited to support Ms. Aubuchon's legal position  
16 on all of the above, including:

- 17 o *Butz v. Economou* 438 U.S. 478, 98 S. CT. 2894 Quasi-judicial  
18 immunity
- 19 o *Bettencourt v. Bd. Of Registration in Med.*, 904 F. 2d 772 (1<sup>st</sup>  
20 Cir 1990)
- 21 o *Imbler v. Patchman*, 424 U.S. 409, 424 (1976) Prosecutorial  
22 Immunity
- 23 o *Briscoe v. LaHue*, 460 U.S.325, 334 (1983) Prosecutor's  
24 immunity parallels judicial immunity
- 25 o *Demery v. Kupperman*, 735 F. 2d 1139 (9<sup>th</sup> Cir. 1984) Deputy  
26 attorney general afforded absolute immunity for prosecution of

1 administrative action and failure to disclose information after  
2 administrative action.

3 All of the foregoing are material and will be addressed in the proceeding. Lisa M. Aubuchon  
4 reserves the right to cross-examine any and all witnesses, the right to respond to any and all  
5 allegations, the right to confront any and all witnesses, the right to put on a professional defense, and  
6 the right to bring forth any and all other matters that come about in any further discovery or that are  
7 relevant to this proceeding. But because all of these matters, some individually and all collectively,  
8 have combined and will combine to deprive her of due process of law, this case should be dismissed  
9 as to Lisa M. Aubuchon in its entirety.

10  
11 **D. Respondent Alexander's Separate Statement of Issues of Fact and Law Believed to Be**  
12 **Material.**

13 1. Whether Arizona statutes or Supreme Court rules may limit the scope and application  
14 of 18 U.S.C. §1962, *et seq.* in light of the doctrine of preemption, the Supremacy Clause of the  
15 United States Constitution, the United States Supreme Court decision in *Felder v. Casey*, 487 U.S.  
16 131, 138 (1988) and its progeny, and the United States Congress' expression that "[t]he provisions  
17 of [18 U.S.C. §1962, *et seq.*] shall be liberally construed to effectuate its remedial purposes."

18 2. Whether Alexander is subject to discipline for praying for equitable relief under 18  
19 U.S.C. §1962, *et seq.* in light of the split of authority between the various Federal Circuit Courts of  
20 Appeal and the lack of a resolution to the Circuit-wide split by the United States Supreme Court.

21 3. Whether Alexander is subject to discipline for otherwise making arguments that  
22 advocate for an extension or expansion of then-existing law or authority.

23 4. Whether Alexander reasonably relied on the statements of Aubuchon, Thomas, and  
24 her supervisor, Peter Spaw, regarding the factual basis for the proposed amended complaint she  
25 prepared.  
26

1           5.     Whether Alexander reasonably relied on her supervisor, Peter Spaw, to accomplish  
2 various tasks related to the RICO matter.

3           6.     Whether Alexander is being selectively prosecuted by the State Bar for engaging in  
4 political activities in her personal time and otherwise exercising her rights under the First  
5 Amendment.  
6

7           7.     Whether contesting various matters, with the assistance of counsel, during the  
8 screening investigation of Respondents equates to a violation of Rule 53 even though Alexander also  
9 provided a substantive response to the issues raised during the screening investigation.

10          8.     In addition to the above, Alexander joins in the separate statements of issues of facts  
11 and law believed to be material raised by Thomas and Aubuchon, and incorporates said statements  
12 by this reference as if fully set forth here.  
13

#### 14           **IV.     WITNESSES**

##### 15           **A.   IBC's Witnesses.**

16           Each witness will testify about his or her background, about the exhibits of which they have  
17 knowledge, and about the matters listed in the "Nature of Testimony" portion of the chart of IBC's  
18 witnesses, attached hereto as Exhibit B.

19           IBC will list his objections to Respondent Thomas' and Aubuchon's witnesses at a later date.  
20 IBC has no objection to Respondent Alexander's witnesses.  
21

##### 22           **B.   Respondent Thomas' Witnesses.**

23           Respondent Thomas' witness list is Exhibit C hereto.

##### 24           **C.   Respondent Aubuchon's Witnesses.**

25           Respondent Aubuchon's witness list is Exhibit D hereto.  
26

1  
2 **D. Respondent Alexander's Witnesses.**

3 Alexander may call at trial any of witnesses listed by any other party. Each witness will  
4 testify about his or her background and the matters listed in the "Nature of Testimony" portion of the  
5 chart of Alexander's witnesses attached hereto as Exhibit E.  
6

7 **V. EXHIBITS**

8 **A. IBC's Exhibits.**

9 See IBC's Exhibit List, attached hereto as Exhibit F. IBC reserves the right to use for  
10 purposes of impeachment the deposition testimony taken of any listed witness. IBC lists as  
11 additional exhibits the transcripts of the depositions of Andrew Thomas, Lisa Aubuchon, Rachel  
12 Alexander, Sally Wells, Philip MacDonnell, Mark Goldman and Sheriff Joe Arpaio. IBC will be  
13 filing with the Court the original transcripts of these depositions.  
14

15 IBC further reserves the right to offer any other exhibits necessary for impeachment or  
16 rebuttal. IBC also will use a demonstrative exhibit (a timeline).

17 IBC will state his objections to Respondent Thomas' and Aubuchon's exhibits at a later date.  
18 IBC has no objections to Respondent Alexander's exhibits.

19 **B. Respondent Thomas' Exhibits.**

20 Respondent Thomas' exhibit list is Exhibit G hereto. Thomas' objection to IBC's exhibits  
21 also is part of Exhibit G.  
22

23 **C. Respondent Aubuchon's Exhibits.**

24 Respondent Aubuchon's exhibit list is Exhibit H hereto.  
25  
26

1  
2 **D. Respondent Alexander's Exhibits and Objections to IBC's Exhibits.**

3 **1. Alexander's Exhibits.**

4 See Alexander's Exhibit List, attached hereto as Exhibit I. Alexander may introduce at trial  
5 any of those documents listed as an Exhibit by any other party. Alexander further reserves the right  
6 to offer any other exhibits necessary for impeachment or rebuttal.  
7

8 **2. Alexander's Objections to IBC's Exhibits.**

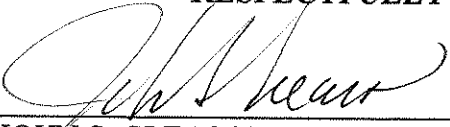
9  
10 IBC Exhibits Nos. 2 and 3: Alexander objects pursuant to Ariz. R. Evid. 402 on the ground  
11 that IBC Exhibits Nos. 2 and 3, which relate to political activities and the exercise of Alexander's  
12 First Amendment rights in her own time, are irrelevant to the matters at issue in this formal  
13 proceeding. Alexander further objects to IBC Exhibits Nos. 2 and 3 pursuant to Ariz. R. Evid. 403  
14 on the ground that any purported probative value of Exhibits Nos. 2 and 3 is substantially  
15 outweighed by the danger of unfair prejudice to Alexander, and Exhibits Nos. 2 and 3 are needless  
16 cumulative evidence on an issue that is collateral the matters at issue in this formal proceeding.  
17

18 **VI. DEPOSITIONS**

19 **A. Thomas' Statement Regarding Depositions.**

20 Thomas may designate portions of deposition testimony at a later date. IBC reserves the  
21 right to counter-designate portions of Mr. Driscoll's deposition testimony at that time.  
22  
23  
24  
25  
26

1  
2 RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of September, 2011.

3  
4 

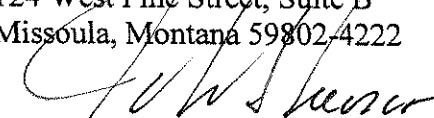
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